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# Protecting Ancient Heritage in Armed Conflict: New Rules for Targeting Cultural Property During Conflict with ISIS

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## COMMENT

## Protecting Ancient Heritage in Armed Conflict: New Rules for Targeting Cultural Property During Conflict with ISIS

HANNAH G. HE<sup>†</sup>

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### INTRODUCTION

The Middle East has often been called the “Cradle of Civilization,” and is home to countless sites of cultural importance. The region has also been a focal point for religious-based conflicts over the centuries, as tribes clashed, Crusaders marched to the Holy Land, and the Jewish people sought refuge. This ongoing clash between cultures has culminated in a precarious position for many historic sites throughout Syria and Iraq, as current conflicts threaten their safety. This paper explores the protection offered to these historic sites by international law and will recommend new rules of engagement to protect these sites for future generations.

The first part of this paper presents a brief overview of the

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development of the international customary law protecting property of cultural significance.<sup>1</sup> Part II identifies the current threats to such sites, the motivations behind these threats, and how the international community has responded.<sup>2</sup> Part III proposes ways to combat these types of threats.<sup>3</sup>

#### I. THE DEVELOPMENT OF CULTURAL PROPERTY PROTECTION AS CUSTOMARY INTERNATIONAL LAW

The “spoils of war” practice has been a longstanding tradition among warring nations.<sup>4</sup> Traditionally, plunder was taken from defeated nations and sent as tribute to the victor.<sup>5</sup> Since many cultures used their finest materials and most precious items to honor their deities, often this tribute was plunder taken from temples and other sacred sites.<sup>6</sup> At the same time, philosophers in Rome and throughout Greece warned against destroying culturally significant places out of vengeance.<sup>7</sup> Some members of the Catholic Church also traditionally warned against pillaging, and asked for protection of churches as sacred places.<sup>8</sup> However, it wasn’t until centuries later that international law began to recognize a duty to protect such sites from the damages of war.

##### A. *Protection of monuments before World War II*

In 1863, the United States became the first nation to codify the protection of cultural sites. Because the primary goal of the Civil War was to reestablish authority over seceded states, preserving such sites was considered crucial to maintaining a national identity.<sup>9</sup> The first written regulation for a standing army, “The Instruction for the Government of Armies of the United States in the Field,” better

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1. See *infra* Part I.

2. See *infra* Part II.

3. See *infra* Part III.

4. Harvey E. Oyer III, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict – Is It Working? A Case Study: The Persian Gulf War Experience*, 23 COLUM.-VLA J.L. & ARTS 49, 49 (1999).

5. See *id.*; JIŘÍ TOMAN, *THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT* 4 (1996).

6. TOMAN, *supra* note 5, at 4.

7. *Id.*

8. Oyer, *supra* note 4, at 49.

9. Burrus M. Carnahan, *Lincoln, Lieber, and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT’L L. 213, 222 (1998); U.S. War Department, General Orders No. 100 arts. 31–36 (April 24, 1863), available at [http://avalon.law.yale.edu/19th\\_century/lieber.asp#sec2](http://avalon.law.yale.edu/19th_century/lieber.asp#sec2) [hereinafter *The Lieber Code*].

known as the Lieber Code, created explicit protection for churches, hospitals, and other establishments, including “museums of the fine arts, or of a scientific character.”<sup>10</sup>

In time, international agreements came to govern the conduct of war. The Hague Conventions with Respect to the Laws and Customs of War on Land were signed in 1899<sup>11</sup> and 1907.<sup>12</sup> These pacts complemented one another, and recognized that protection of cultural and historical sites should be a guiding principle of planning land warfare. Article 56 of the 1899 Hague Convention treated all property of the arts and sciences as private property and forbade the pillaging of those sites.<sup>13</sup> The 1907 Hague Convention extended these protections to any buildings dedicated to religion, art, science, or charitable purposes, as well as historic monuments.<sup>14</sup>

From 1914 to 1918, Europe was embroiled in the Great War, as thirty-two nations around the globe fought each other. In addition to the staggering loss of human life, other casualties of war included the Reims Cathedral in France and numerous other cultural sites.<sup>15</sup> Following the armistice, the Paris Peace Conference negotiations condemned the targeting of historic sites,<sup>16</sup> and the Treaty of Versailles required that specific cultural items be returned to their original nations.<sup>17</sup>

In 1930, the Roerich Museum in New York City proposed a new convention to the International Museums Office of the League of Nations.<sup>18</sup> The resulting Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (“the Roerich Pact”) was subsequently signed by ten nations in the Americas in 1935.<sup>19</sup> This agreement declared buildings such as museums and historic

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10. The Lieber Code, *supra* note 9, art. 31.

11. Convention with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land arts. 28, 47, 56, July 29, 1899, 32 Stat. 1803, T.S. No. 403 [hereinafter Hague II].

12. Convention Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 27, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 538 [hereinafter Hague IV].

13. Hague II, *supra* note 11, arts. 47, 56.

14. Hague IV, *supra* note 12, art. 27.

15. ROGER O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 37–38 (2006).

16. *Id.* at 43.

17. VICKI CASSMAN ET AL., HUMAN REMAINS: GUIDE FOR MUSEUMS AND ACADEMIC INSTITUTIONS 225 (2006).

18. TOMAN, *supra* note 5, at 16–17.

19. *Id.*

monuments to be neutral in all armed conflicts, and therefore exempt from becoming military targets.<sup>20</sup>

The next decade saw the world again at war, and this time, art and cultural sites were a key target for the Nazi forces. Germany created “trophy brigades,” assigned to locate and seize specific pieces of art to bring back to Germany.<sup>21</sup> They were also tasked with destroying “degenerate” artworks which Hitler found objectionable.<sup>22</sup> As a result, both private and public collections across France, Belgium, and Italy were raided and dissected, and thousands of pieces of art were destroyed or shipped to Germany and Austria to be added to Hitler’s collection.<sup>23</sup> Most prominently, the private collections of French Jews, such as the Rothschilds, were seized and often found in the private residences of various Nazi generals after the war ended.<sup>24</sup>

Hitler also ordered the deliberate destruction of historic sites with the intent of breaking down the targeted country’s morale. He issued an order to destroy all of the bridges of Florence, some in the locations originally established by the Romans and later improved upon by geniuses such as Michelangelo.<sup>25</sup> In Florence, only the ponte Vecchio was spared.<sup>26</sup> Plans were also made to destroy important infrastructure as the Nazis withdrew from Italy and France, including orders to raze sites such as the Eiffel Tower and Notre Dame Cathedral in Paris.<sup>27</sup>

Throughout World War II, Pope Pius XII pleaded with both the Allies and the Axis to protect the historical and religious sites in Rome and the surrounding area.<sup>28</sup> He understood that the capital city was a key strategic target, but argued that destroying the heart of the

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20. *Id.*

21. *See generally* ROBERT M. EDSSEL, *THE MONUMENTS MEN*, xiv, 297–98 (2009).

22. *Id.* at 12–13, 248.

23. *Id.*

24. *See id.* at 42. *See also* Robert Schwartz, *The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II*, 32 COLUM. J.L. & SOC. PROBS. 1, 4–5 (1998). For a perspective on Jewish religious law covering art restitution, *see* Steven H. Resnicoff, *The Jewish Perspective on the Theft of Artworks Stolen During World War II*, 100 DEPAUL-LCA J. ART & ENT. L. & POL’Y 67 (2000).

25. O’KEEFE, *supra* note 15, at 76.

26. *Id.*

27. *Id.*

28. *Id.* at 71.

city would defeat the purpose of winning it.<sup>29</sup>

On the Allied side, General of the Army Dwight D. Eisenhower issued orders requiring a showing of military necessity, not just military convenience, when targeting a historical site.<sup>30</sup> In the aftermath of the Allies destroying the Monte Cassino abbey in Italy, he wrote that Italy had “contributed greatly to our cultural inheritance,” but warned his commanders that the lives of Allied soldiers would always be worth more than an historic building.<sup>31</sup> In preparation for the D-day attacks of June 6, 1944, General Eisenhower issued another memorandum, distributed to every soldier being sent to France, in which he instructed his commanders that whatever historic monuments they came across on the European continent represented the very heritage they were fighting for and should be preserved.<sup>32</sup>

The United States also created the Monuments, Fine Arts, and Archives Division (MFAA) in the Civil Affairs branch of the Army. The main purpose of the MFAA was to advise ground commanders operating in cultural areas such as Florence and Paris, and to document the current status of historic sites.<sup>33</sup> They developed lists of

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29. *Id.*

30. John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J. INT’L. L. 831, 838–39 (1986). See also Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 277, 288–90 (1997).

31. Letter from Dwight D. Eisenhower, Commander-in-Chief, Allied Forces Headquarters, to All Commanders of the Allied Forces, (Dec. 29, 1943), in Greg Bradsher & Sylvia Naylor, *General Dwight D. Eisenhower and the Protection of Cultural Property*, NAT’L ARCHIVES TEXT MESSAGE BLOG (Feb. 10, 2014), <http://blogs.archives.gov/TextMessage/2014/02/10/general-dwight-d-eisenhower-and-the-protection-of-cultural-property>.

32. Memorandum from Dwight D. Eisenhower, General, U.S. Army, to G.O.C. in Chief, 21 Army Group; Commanding General, 1st U.S. Army Group; Allied Naval Commander, Expeditionary Force; and Air C-in-C, Allied Expeditionary Force (May 26, 1944), in Greg Bradsher & Sylvia Naylor, *General Dwight D. Eisenhower and the Protection of Cultural Property*, NAT’L ARCHIVES TEXT MESSAGE BLOG (Feb. 10, 2014), <http://blogs.archives.gov/TextMessage/2014/02/10/general-dwight-d-eisenhower-and-the-protection-of-cultural-property>.

33. The members of the division came to be known as the “Monuments Men.” The duties of the Monuments Men included advising commanders on what areas included protected sites such as churches or synagogues, as well as inspecting sites that may have already been damaged and coordinating with local civilians to repair what could be saved. For instance, in Milan, the church containing Leonardo Da Vinci’s *Last Supper* fresco was bombed, resulting in a piece of the fresco being exposed to the elements. The Monuments Men assigned to the region coordinated to build temporary structures around the masterpiece to protect it from further damage. ROBERT M. EDESEL, *SAVING ITALY: THE RACE TO RESCUE A NATION’S TREASURES FROM THE NAZIS* 3–5 (2013).

protected monuments and historic buildings, and helped pilots develop maps with “no strike” zones around particularly vulnerable areas.<sup>34</sup> The work of this highly-specialized team of soldiers, comprised of subject matter experts from America’s leading museums and universities, enabled military commanders to limit the destruction of revered sites throughout Europe.

*B. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*

As the world came together to heal in the aftermath of World War II, one of the new international agreements created to prevent future destruction was the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (“1954 Hague Convention”).<sup>35</sup> This agreement was developed by the new United Nations Educational, Scientific, and Cultural Organization (UNESCO) to supplement and build upon the many international agreements already in place regarding cultural property protection, including the prior Hague Conventions and the Roerich Pact.<sup>36</sup>

The 1954 Hague Convention includes a Preamble, forty articles of General Provisions, twenty-one articles of regulations, and a three part Protocol.<sup>37</sup> The Preamble states that: “[D]amages to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contributions to the culture of the world . . . .”<sup>38</sup>

The 1954 Hague Convention represents the first time the term “cultural property” was explicitly used to collectively describe buildings, monuments, and objects in an international agreement.<sup>39</sup> Article I defines cultural property to include both movable and immovable property, buildings, and “centers containing monuments.”<sup>40</sup> Article 2 defines the protection of cultural property as

34. *Id.*

35. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter 1954 Hague Convention].

36. *Id.*

37. *Id.*

38. *Id.* pmbl.

39. Oyer, *supra* note 4, at 52.

40. See 1954 Hague Convention, *supra* note 35, art. 1:

For the purposes of the present Convention, the term “cultural property” shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or

“the safeguarding of and respect for such property.”<sup>41</sup> While the task of safeguarding is fairly straightforward, the convention also requires parties to respect cultural property by “refraining from any use of the property and its immediate surrounding . . . for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property.”<sup>42</sup>

This protection may be waived under two conditions, the first of which being military necessity.<sup>43</sup> The drafters purposefully left to the individual nations the determination of what property was “of great importance” or what measures were necessary to safeguard such property, as well as the definition of “military necessity.”<sup>44</sup> At the time, it was also understood that no protection would be offered to sites being used for a military purpose, and the 1954 Hague Convention banned using any sites in such a way.

Article 7 of the 1954 Hague Convention requires the contracting parties to introduce the Convention’s core concepts – the safeguarding and protection of cultural property – into their national military regulations, “to foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples.”<sup>45</sup> This requirement was inspired by the work of the Monuments Men during World War II, who helped identify cultural sites for protection, and also reported on the condition of sites after the conflict had ended.<sup>46</sup> A majority of these soldiers were experts in their fields of art or architecture, not just foot soldiers, and UNESCO

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history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as “centers containing monuments.”

41. *Id.* art. 2.

42. *Id.*

43. *See infra* I.C. for further discussion of military necessity.

44. O’KEEFE, *supra* note 11, at 92–93, 105–06, 121–22.

45. 1954 Hague Convention, *supra* note 35, at art. 7.

46. O’KEEFE, *supra* note 15, at 77–79, 91–93.



recognized that such expertise was needed in the field.<sup>47</sup> The drafters also hoped that making a similar corps of officers a permanent part of standing armies would result in integrated planning and prevent any reactive harm during the initial stages of a conflict.<sup>48</sup>

In addition to the main document, the parties also simultaneously executed a separate First Protocol.<sup>49</sup> This protocol imposes a duty on signatory nations to prevent the exportation of movable cultural property from areas of conflict or occupation, and requires the return of any illicitly-moved property.<sup>50</sup> It also includes a provision that any cultural property moved to another region or nation for safekeeping during a conflict or occupation must be returned to the nation from which it was removed.<sup>51</sup>

By the early 1990s, the provisions of the 1954 Hague Convention had been tested by conflicts in Iraq, Kuwait, and Yugoslavia. A 1993 study by Professor Patrick Boylan, commissioned by UNESCO and the Netherlands, found that application of the 1954 Hague Convention was weak among signatory nations, and recommended practical steps for greater participation.<sup>52</sup> A Second Protocol to the 1954 Hague Convention was proposed in 1999.<sup>53</sup>

The Second Protocol supplemented the original agreement, and included “enhanced protection” for cultural property under specific conditions.<sup>54</sup> Article 6 of the Second Protocol also provided further guidelines for defining “military necessity,” and when this waiver of protection could be invoked by a nation during armed conflict.<sup>55</sup> Additionally, criminal sanctions were prescribed in Article 15 and 16

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47. *Id.* at 77–78, 92.

48. *Id.* at 78.

49. Protocol for the Protection of Cultural Property Armed Conflict, May 14, 1954, 249 U.N.T.S. 358, *available at* <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=79B801B4D23AEA95C12563CD002D6BE3&action=openDocument>.

50. *Id.* ¶ 1.

51. *Id.* ¶¶ 3–5.

52. PATRICK J. BOYLAN, REVIEW OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 7 (1993), *available at* <http://unesdoc.unesco.org/images/0010/001001/100159eo.pdf>.

53. Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 15–26, 1999, *UNESCO Summary Report* (June 1999).

54. Second Protocol to the Hague Convention of the 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 6, Mar. 26, 1999, 38 I.L.M. 769, 2253 U.N.T.S. 172 [hereinafter Second Protocol].

55. *Id.* art 6.

for violations of the Protocol.<sup>56</sup> In response to the increase in domestic conflicts, Article 22 made the Second Protocol applicable to non-international armed conflicts.<sup>57</sup>

*C. The doctrine of military necessity in cultural property protection*

From the American Civil War to the present, military necessity has been interpreted as both a justification for otherwise-inexcusable conduct, and as a limiting consideration during war.<sup>58</sup> The use of the term goes back to the Lieber Code, which states, “Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”<sup>59</sup> This requires an act to be “indispensable,” not just convenient and “lawful according to modern law and usages of war,”<sup>60</sup> which allows the definition of military necessity to adapt to warfare over time.

The 1907 Hague Convention adopted Article 23(g), which defined military necessity as anything that was necessary for offense or defense, either during battle or in preparation for battle.<sup>61</sup> The Convention also created an explicit waiver of protection for any historical monuments being used for military purposes.<sup>62</sup>

During World War II, armies began to apply different definitions of military necessity for ground and air forces. While ground forces were limited by their size and strength, and generally focused on objectives such as a city or a line of defense, air forces were much more flexible and caused destruction that was both more widespread and more specific. While a ground army might battle up a hill over a day, a plane could drop an entire payload of destructive bombs on a target and be back at base by night. As a result, planes were able to target military objectives, such as headquarters buildings, but also began targeting industrial centers, which

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56. *Id.* art. 15–16.

57. *Id.* art. 22.

58. Craig J.S. Forrest, *The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts*, 37 CAL. W. INT’L L. J. 177, 188–91 (2007).

59. The Lieber Code, *supra* note 9, art. 14.

60. *Id.*

61. Hague IV, *supra* note 12; O’KEEFE, *supra* note 15, at 23 (citing L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 2ND VOLUME para. 150 (1912)).

62. O’KEEFE, *supra* note 15, at 25.

weakened the war-making capacity of the enemy, and the surrounding area of support, including the homes of civilian workers.<sup>63</sup>

In response, the 1954 Hague Convention used terms such as “unavoidable” and “imperative” when establishing the waiver of protection for military necessity.<sup>64</sup> The drafters did not, however, want to provide a more specific definition of these terms.<sup>65</sup> They felt that military necessity was already an internationally-recognized principle of warfare which required that a military objective could not be achieved by any other means, and that any damage to cultural property would be restrained to what was absolutely necessary to achieve that objective.<sup>66</sup>

The 1993 Boylan Report highlighted many of the key problems of the 1954 Hague Convention, chief among them this lack of a definition for military necessity. It recommended that the waiver for military necessity be eliminated entirely, since it allowed a ground commander to act as he pleased so long as any destruction he caused fell within “military necessity.”<sup>67</sup> The report was also critical of waivers when a party used a cultural site for military purposes, because the complete waiver of protection made the site vulnerable to further destruction.<sup>68</sup> Citing the fact that such military necessity waivers were deliberately left out of the 1898 and 1907 Hague Conventions, Professor Boylan argued that the waiver defeated the purpose of having any protection during armed conflict.<sup>69</sup>

The Second Protocol did not remove the waiver, but did add a definition of military necessity: “An object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>70</sup> Because there must be some higher strategic advantage to destroying such a site, the Second Protocol also requires that this waiver may only be invoked by the

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63. *Id.* at 64–65.

64. 1954 Hague Convention, *supra* note 35, arts. 4, 11.

65. Jan Hladik, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Notion of Military Necessity*, INT’L REV. OF THE RED CROSS (Sept. 30, 1999), available at <https://www.icrc.org/eng/resources/documents/misc/57jq39.htm>.

66. O’KEEFE, *supra* note 15, at 122.

67. BOYLAN, *supra* note 52, at 51, 57.

68. *Id.* at 55.

69. *Id.* at 56–57.

70. Second Protocol, *supra* note 54, art. 1(f).

commanding officer of a battalion-size element or higher, unless there are extenuating circumstances.<sup>71</sup> The waiver of any protection for sites being used for a military purpose was not changed by the Second Protocol.

*D. Cultural property protection is now a part of customary international law*

Based on an historical understanding that cultural property sites ought to be protected during war, the principles set forth in the 1954 Hague Convention have been accepted as customary international law.<sup>72</sup> In addition, the International Criminal Tribunal of the former Yugoslavia (ICTY) and the International Criminal Court (ICC) have both recognized their jurisdiction over crimes against cultural property.<sup>73</sup>

Although the United States delegate signed the 1954 Hague Convention at the time it was written, the U.S. Senate did not ratify it until 1999.<sup>74</sup> However, the Convention has been binding on the United States since the signing, not only because of its acceptance as customary law but also because the United States has implemented its provisions into its military operations since the Convention took effect in 1956. The “Hague Tradition” is listed as a primary source of the law of armed conflict in the Law of Armed Conflict Deskbook, a reference guide for U.S. Army lawyers and commanders; this tradition includes the 1898 and 1907 Hague Conventions as well as

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71. *Id.* art. 6(c).

72. Customary international law is established among civilized nations when the practice is consistent among states over a period of time and states act in such a way to show that it is legally binding. *See* Kastenbergh, *supra* note 30 (noting that while not all provisions of the Hague convention are customary international law, the basic principles are). *See also* Wayne Sandholtz, *The Iraqi National Museum and International Law: A Duty to Protect*, 44 COLUM. J. TRANSNAT’L L. 185, 228 (2005) (summarizing recent scholarship accepting the basic tenets of cultural property protection as customary international law).

73. *See* Rome Statute of the International Criminal Court art. 8(2), U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute] (listing “intentionally directing attacks” against protected sites as a war crime); International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 3, U.N. Doc. S/25704 (1993) (finding the “destruction or willful damage” to churches and libraries in Yugoslavia to be a war crime); Prosecutor v. Milosevic, Case No. IT-02-54-T, Second Amended Indictment, 23 Oct. 2002 (defending the targeting of churches based on military necessity).

74. *The States Parties: Official List of States Parties to the Hague Convention*, UNESCO, <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-states-parties/#c274778> (last visited Mar. 20, 2015).

the 1954 Hague Convention.<sup>75</sup> The Deskbook also cites a “longstanding prohibition against attacking cultural property,” dating back to the Civil War.<sup>76</sup>

As warfare has developed, protection of cultural property during armed conflict has become an important duty. While some wars have targeted cultural sites, the “good guys” have learned that protecting such sites is a key part of victory. As modern conflicts occur in regions replete with vulnerable cultural sites, the law of war must evolve to ensure that these sites are protected.

## II. THE CURRENT CONFLICT IN THE MIDDLE EAST REQUIRES NEW RULES TO PROTECT CULTURAL PROPERTY

The Islamic State of Iraq and Syria (ISIS) is an organization of radical Islamists currently sweeping across Syria and Iraq.<sup>77</sup> It is just the most recent organization that has advocated the destruction of cultural property for both political and religious reasons.<sup>78</sup> And, as the nature of conflicts in the Middle East has changed, the duty to protect the cultural property in the region has only increased. From the First Gulf War to the present, nations involved in Iraq have recognized a shift from the duty to not target heritage sites to an affirmative duty to protect such sites.

### *A. Destruction of cultural property has a long tradition among violent Islamists*

In March 2001, the Taliban destroyed two statues of the Buddha in the Bamiyan Valley in Afghanistan.<sup>79</sup> These larger-than-life statues were believed to have been carved into the walls of the Bamiyan Cliffs, along with a series of caves inhabited by Buddhist monks,

75. INT’L & OPERATIONAL LAW DEP’T, THE U.S. ARMY JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., LAW OF ARMED CONFLICT DESKBOOK, 19 (2013) [hereinafter LOAC DESKBOOK].

76. *Id.* at 146; DEPARTMENT OF THE ARMY, U.S. ARMY, FIELD MANUAL 27-10: THE LAW OF ARMED CONFLICT 148–49 (1956).

77. Bill Roggio, *ISIS Announces Formation of Caliphate, Rebrands as ‘Islamic State,’* THREAT MATRIX BLOG (June 29, 2014), [http://www.longwarjournal.org/threat-matrix/archives/2014/06/isis\\_announces\\_formation\\_of\\_ca.php#](http://www.longwarjournal.org/threat-matrix/archives/2014/06/isis_announces_formation_of_ca.php#).

78. Rebel groups in Iraq have looted museums and libraries to protest the central government, while religious extremist groups like ISIS have attacked museums and mosques in the name of their religion. *See infra* Part II.A.

79. David Bosco, *Waking the Buddha*, 58 *ARCHAEOLOGY* 1, 18 (2005); Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21<sup>st</sup> Century*, 37 *GEO. J. INT’L L.* 245, 246 (2006).

between the third and fifth centuries AD.<sup>80</sup> They were a site of pilgrimage for Buddhists traveling the Silk Road, even after Islam became the predominant religion in the region.<sup>81</sup> A Taliban envoy stated that the statues were destroyed in response to offers of aid to help preserve the area while Afghani children were starving. The Taliban Supreme Court, however, affirmed the order to destroy the statues on the basis of idolatry.<sup>82</sup> In addition, the Taliban destroyed thousands of objects held in the National Museum of Kabul.<sup>83</sup>

Many nations, including India, the European Union, and the United States, spoke out against the destruction of the statues, arguing that Islamic beliefs could not justify destroying a part of human history.<sup>84</sup> Because this destruction did not occur during a conflict, the legal framework surrounding any protection of the sites has been debated. Theories of violation of the human rights of Buddhists worldwide have been offered, as well as the theory that the statues represented cultural heritage for all mankind.<sup>85</sup> Currently, no international organization has chosen to prosecute the Taliban officials responsible for the act.<sup>86</sup>

The Islamic rationale behind all of this destruction is a Salafist view of shirk. Salafi Islam believes in practicing Islam in accordance with practices at the time of Muhammad, and strictly adheres to *shirk*, or the complete rejection of polytheism.<sup>87</sup> Salafists view any act of respect to any person as a form of idolatry, and believe that sites should not be preserved or respected because of their connection to a person or event.<sup>88</sup> They also acknowledge that these historic sites often bring together local cultures, and recognize the tactical advantage in targeting and destroying such sites as a physical attack

80. *Cultural Landscape and Archaeological Remains of the Bamiyan Valley*, UNESCO <http://whc.unesco.org/en/list/208> (last visited Apr. 12, 2015).

81. Bosco, *supra* note 79, at 18.

82. Barbara Crossette, *Taliban Explains Buddha Demolition*, N.Y. TIMES, Mar. 19, 2001, at A9, available at <http://www.nytimes.com/2001/03/19/world/19TALI.html>.

83. Kevin D. Kornegay, *Destroying the Shrines of Unbelievers: The Challenge of Iconoclasm to the International Framework for the Protection of Cultural Property*, 221 MIL. L. R. 153, 155 (2014).

84. Press Release, General Assembly, General Assembly 'Appalled' by Edict on Destruction of Afghan Shrines; Strongly Urges Taliban to Halt Implementation, U.N. Press Release GA/9858 (Mar. 9, 2001).

85. *Id.*

86. See Kornegay, *supra* note 83.

87. Uriya Shavit, *The Wasati and Salafi Approaches to the Religious Law of Muslim Minorities*, 19 ISLAMIC L. & SOC'Y 416, 427 (2012).

88. *Id.* at 415, 427–28, 443.

on a culture they deem sacrilegious.<sup>89</sup>

Years after the Bamiyan Valley was altered forever, other radical Islamists have continued to destroy historic sites throughout the Middle East and Africa. In March 2012, the shrine of Abdel Salam al-Asmar was destroyed in Zlitan, Libya, following the overthrow of Muammar Gaddafi.<sup>90</sup> Even Timbuktu, a UNESCO Heritage Site, was the victim of several attacks.<sup>91</sup> A shrine in Lahore, Pakistan, was bombed in 2010.<sup>92</sup> In 2013, over 40 sacred sites in Tunisia were attacked by militant Islamists.<sup>93</sup>

In response, UNESCO has called for action, with its Director-General going so far as to label the acts as war crimes.<sup>94</sup> The ICC is currently investigating crimes against humanity in Mali, including the destruction of museums and mosques in Timbuktu.<sup>95</sup> The protections of the Second Protocol, giving sites the same protection during internal conflicts as during international conflicts, can do very little against groups who refuse to abide by international law. While states may be prohibited under international treaties from using historic sites for a military purpose, no such warnings can effectively be given to small bands of jihadists.

#### *B. The duty to protect sites throughout Iraq has shifted*

As the cradle of civilization, many of humanity's earliest cultural artifacts have been found in the Middle East.<sup>96</sup> The fruits of archaeological digs in modern Iraq from the turn of the twentieth

89. Ishaan Tharoor, *The Beautiful, Historic Shrines That Islamists Try to Destroy*, WASH. POST WORLDVIEWS BLOG (July 25, 2014), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/07/25/the-beautiful-historic-shrines-that-islamists-try-to-destroy/>.

90. David Kilpatrick, *Libya Officials Seem Helpless as Sufi Shrines Are Vandalized*, N.Y. TIMES, (Aug. 28, 2012), available at <http://nyti.ms/1Gdv1WL>.

91. Lydia Polgreen, *As Extremists Invaded, Timbuktu Hid Artifacts of a Golden Age*, N.Y. TIMES (Feb. 3, 2013), available at <http://nyti.ms/18SAuVz>.

92. Sabrina Tavernise and Waqar Gillani, *Suicide Bombers Strike Sufi Shrine in Pakistan*, N.Y. TIMES (July 1, 2010), available at <http://nyti.ms/1yHEDs8>.

93. *Tunisia's Shrines: Puritans on the Attack*, THE ECONOMIST POMEGRANATE BLOG (Feb. 6, 2013, 4:32 PM) <http://www.economist.com/node/21571376>.

94. Irina Bokova, *Opinion: Timbuktu Tomb Attack Is an Attack on Our Humanity*, CNN (July 4, 2012, 11:13 AM), <http://edition.cnn.com/2012/07/02/opinion/unesco-mali-opinion/>.

95. Letter from Malick Coulibaly, Minister of Justice, Mali, to the Prosecutor of the International Criminal Court (July 13, 2012), available at <http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>.

96. See Gertsenblith, *supra* note 81, at 273–76.

century onward led to the creation of the Iraqi Museum, a vast collection of artifacts from the region.<sup>97</sup> During the first Gulf War in the early 1990s, local Iraqi groups rebelling against the central government attacked the local museum system throughout Iraq, resulting in a loss of thousands of objects stolen and either destroyed or sold on the black market.<sup>98</sup> When the United States entered the conflict in Iraq in 1991, archaeologists and historians protested bombings near archaeological sites until the Department of Defense developed a no-strike list over a month into the conflict.<sup>99</sup> In compliance with international law, the U.S. refrained from targeting any historic sites unless they were being used for a military purpose.<sup>100</sup>

In 2003, the United States began consulting with archaeologists and cultural experts during the planning stages of the invasion of Iraq. Scholars argued that destroying cultural sites in Iraq would anger not only local nationals, but also Muslims around the world, who were already suspicious of America's global war on terror.<sup>101</sup> While training for deployment, American forces were taught to not target cultural sites unless they presented an identifiable threat, such as a sniper in a minaret, and to be sensitive of sites that were locally respected. Active protection of such sites, however, was not part of the mission.<sup>102</sup>

Shortly after the Hussein government disintegrated, civil unrest swept the country much like during the First Gulf War, and again, museums became a target of local rebels.<sup>103</sup> The National Museum in Baghdad was looted, and the sight of priceless treasures being carried down the front steps of the museum made international news.<sup>104</sup> While the U.S. Department of Defense tried to defend its position in Iraq by saying that its responsibilities extended only to not targeting the civilian museum, later statements acknowledged the duty to

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97. *Id.* at 278–79.

98. *Id.* at 282; Marion Forsyth, *Casualties of War: The Destruction of Iraq's Cultural Heritage as a Result of U.S. Action During and After the 1991 Gulf War*, 14 DEPAUL-LCA J. ART. & ENT. L. & POL'Y 73, 82–83 (2004).

99. Forsyth, *supra* note 100, at 91.

100. *Id.*

101. Matthew D. Thurlow, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE HUM. RTS. & DEV. L.J. 153, 175 (2005).

102. *Id.* at 176.

103. *Id.*

104. *Id.* at 177 n.136.



protect the property as well.<sup>105</sup> This articulated duty to preserve cultural property now rests not only on a nation's own force, but also on outside nations invading or occupying a protected area.<sup>106</sup>

*C. ISIS is not abiding by international law, and a new response is needed to protect cultural sites from damage*

Since early 2014, ISIS has been destroying historical sites throughout Syria and Iraq. One of the most publicized events occurred in late July 2014, when ISIS forces destroyed the tomb of Jonah in Mosul in Northern Iraq.<sup>107</sup> The tombs of Mosul have been honored for centuries, and Jonah is a prominent figure in both the Old Testament as well as the Quran.<sup>108</sup> Destroying the tomb, and publicly distributing the video of the explosion, was a statement to the world that ISIS fighters would not bend to international calls for peace. Not only has ISIS been targeting more Islamic sites, they have also attacked Christian sites, such as St. Ephrem's Cathedral, and have destroyed the Eliyahu Hanhavi synagogue in Damascus, in an effort to "purify" the region.<sup>109</sup> In February 2015, following the beheading of 21 Coptic Christians by ISIS fighters in Libya, the Church of the Virgin Mary was destroyed with improvised explosive devices in Mosul.<sup>110</sup>

Similarly, the city of Aleppo in Syria, once a major trading city, has been devastated by the aftermath of skirmishes between rebels and local troops. The Great Mosque of Aleppo, including its library of ancient religious manuscripts, and the adjacent souq marketplace,

105. *Id.* at 177–78.

106. *Id.* at 180.

107. Tharoor, *supra* note 91.

108. Mark Movsesian, *Why Did Isis Destroy the Tomb of Jonah?*, FIRST THINGS BLOG (July 28, 2014) <http://www.firstthings.com/blogs/firstthoughts/2014/07/why-did-isis-destroy-the-tomb-of-jonah>. The Tomb of Jonah was believed to be built over the ancient city of Ninevah, and may have held the remains of both the Jewish Prophet Jonah and the whale which swallowed him. The Mosul Mosque was built over the site of a Christian Church there in the early 14<sup>th</sup> century. It is one of the few sites in Northern Iraq respected by Judaism, Christianity, and Islam. *Id.*

109. Graham Bowley, *Antiquities Lost, Casualties of War: In Syria and Iraq, Trying to Protect a Heritage at Risk*, N.Y. TIMES (Oct. 3, 2014), <http://www.nytimes.com/2014/10/05/arts/design/in-syria-and-iraq-trying-to-protect-a-heritage-at-risk.html>; see also Joe Parkinson et al., *Syrian 'Monuments Men' Race to Protect Antiquities as Looting Bankrolls Terror*, WALL ST. J. (Feb. 10, 2015), <http://www.wsj.com/articles/syrian-monuments-men-race-to-protect-antiquities-as-looting-bankrolls-terror-1423615241>.

110. Jack Phillips, *ISIS Blows up Church of the Virgin Mary in Iraq: Reports*, EPOCH TIMES (last updated Feb. 24, 2015, 2:15 PM), <http://www.theepochtimes.com/n3/1260590-isis-blows-up-church-of-the-virgin-mary-in-iraq-reports/>.

were used as a base of operations by government troops, leading rebels to target it with rockets and small arms fire.<sup>111</sup> The Great Mosque caught fire and burned, and the adjacent minaret tumbled to the ground.<sup>112</sup> In addition, ancient Roman ruins of forts and military barracks, once viewed as near-pristine relics of a great empire, have been used again for their military advantage, resulting in extensive damage to their ancient walls.<sup>113</sup>

Much like in the Bamiyan Valley, this destruction is viewed as the result of internal conflict, as many of the rebels are citizens of Iraq and Syria. Both parties, the ISIS rebels and the Syrian government, have been blamed for the destruction. As neither Iraq nor Syria is party to the Second Protocol, however, the duty to protect cultural sites during a domestic conflict does not apply.<sup>114</sup> However, by using an archaeological site for a military purpose, Syria violated international law, with disastrous consequences. Because the 1954 Hague Convention was written to govern states and national armies, a new set of rules will have to be developed by the nations fighting ISIS if cultural sites are to be protected.

The United States Committee of the Blue Shield<sup>115</sup> issued a statement in June of 2014 calling for the protection of sites throughout Iraq and Syria.<sup>116</sup> The statement called on all nations involved in armed conflict to abide by international conventions and customary international law to protect cultural sites and to stop the potential looting and selling of moveable cultural property.<sup>117</sup> In February 2015, the United Nations Security Council adopted Resolution 2199, which specifically condemned the destruction and looting of cultural heritage throughout the conflict zones.<sup>118</sup> Acknowledging that ISIS was generating income from selling looted

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111. *Id.*

112. *Id.*

113. Global Heritage Fund, *Syrian Army Attacks Palmyra's Roman Ruins*, HERITAGE ON THE WIRE BLOG (Mar. 5, 2012), [http://globalheritagefund.org/onthe-wire/blog/palmyras\\_ruins](http://globalheritagefund.org/onthe-wire/blog/palmyras_ruins); Ginger Pinholster, *New High-Resolution Satellite Image Analysis: 5 of 6 Syrian World Heritage Sites "Exhibit Significant Damage,"* AM. ASS'N. FOR THE ADVANCEMENT OF SCI. (Sept. 18, 2014), <http://www.aaas.org/news/aaas-satellite-image-analysis-five-six-syrian-world-heritage-sites-exhibit-significant-damage>.

114. *Id.*

115. The U.S. Committee of the Blue Shield is a national organization created to promote adherence to the Hague Convention within the US.

116. *Blue Shield's Statement on Iraq*, U.S. COMM. OF THE BLUE SHIELD (June 17, 2014), <http://uscbs.org/news/blue-shields-statement-on-iraq/>.

117. *Id.*

118. S.C. Res. 2199, paras. 15–17, U.N. Doc. S/RES/2199 (Feb. 10, 2015).

artifacts, it urged all member states to take appropriate measures to stop the import and sale of stolen artifacts.<sup>119</sup>

In July 2014, ISIS militants occupied the Mosul Museum. There, militants threatened the museum staff, barricaded the entrances, and announced to local press that they were waiting for orders to destroy the museum.<sup>120</sup> In February 2015, ISIS released a video to news media showing men tearing down iconic Assyrian statues throughout the museum, and breaking them up with hacksaws and pickaxes.<sup>121</sup>

UNESCO called an emergency meeting in Paris in September 2014 to discuss the number of sites at risk or already destroyed and issued a call to action to all nations involved in the region.<sup>122</sup> The Director General of UNESCO, Irina Burkova, shared the coordinates of all major cultural heritage sites with the United States as soon as the U.S. announced its intention to commence air strikes in Iraq.<sup>123</sup> In a subsequent emergency meeting, UNESCO addressed the question of which cultural groups would protect cultural heritage sites in areas where ethnic cleansing was rampant, especially in areas where huge portions of the population had fled or been killed.<sup>124</sup>

Also in September 2014, U.S. Secretary of State John Kerry addressed an audience at the Metropolitan Museum in New York City, where he called ISIS's actions "cultural barbarism as its worst."<sup>125</sup> In addition to vowing to protect cultural heritage sites in areas of conflict, the Secretary Kerry spoke of partnering with numerous organizations, including the American Schools of Oriental Research and the American Association for the Advancement of Science, to document historical sites, to identify them in case of nearby destruction, and to develop plans to protect them in the future.

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119. *Id.* ¶ 17.

120. *The Plight of Mosul's Museum: Iraqi Antiquities At Risk of Ruin*, NPR (July 9, 2014), transcript available at <http://www.npr.org/2014/07/09/330183802/the-plight-of-mosuls-museum-iraqi-antiquities-at-risk-of-ruin>.

121. Anne Barnard, *ISIS Onslaught Engulfs Assyrian Christians as Militants Destroy Ancient Art*, N.Y. TIMES (Feb. 26, 2015), <http://nyti.ms/18plrDA>.

122. *A Call to Save Iraq's Cultural Heritage*, UNESCO (Sept. 30, 2014), <http://en.unesco.org/news/call-save-iraq%E2%80%99s-cultural-heritage>.

123. *September 2014 USCBS Annual Meeting*, U.S. COMM. OF THE BLUE SHIELD, <http://uscbs.org/news/2014-uscbs-annual-meeting/> (last visited Mar. 20, 2014).

124. Lyn Julius, *UN Attempt to Save Jewish Sites from ISIS – Too Little Too Late?*, ARUTZ SHEVA (Dec. 17, 2014, 11:53 AM) <http://www.israelnationalnews.com/News/News.aspx/188324#.VOEiWfnF-Di>.

125. John Kerry, Sec'y of State, Address at Threats to Cultural Heritage in Iraq and Syria Event, (Sept. 22, 2014) transcript available at <http://www.state.gov/secretary/remarks/2014/09/231992.htm>.

Just a few days earlier, Secretary Kerry addressed the United Nations, saying that cutting off terrorist funding was a crucial part of the overall campaign against the ISIS. This could only be achieved by protecting the most at-risk movable cultural property in Syria and Iraq, some of which has already been sold on the black market and used to fund rebel groups.<sup>126</sup>

It is apparent that the ISIS does not intend to stop attacking cultural sites in Syria and Iraq. Now that nations including the United States are directing air strikes against ISIS forces and offering support to Iraqi troops, the U.S. is in a unique position to prove that it has learned from the aftermath of the Iraqi Museum looting and is committed to protecting the cultural heritage of the Middle East. In order to do this, the concepts of military necessity must be weighed against the need to preserve historic sites for the future, and the least-destructive means available should always be chosen.

### III. RECOMMENDATIONS FOR BALANCING THE PRESERVATION OF CULTURAL SITES WITH MILITARY NECESSITY

In order to protect cultural sites from destruction during the conflict with ISIS, the Second Protocol's waiver of protection for sites being used for military purposes must be removed, and an analysis balancing military necessity and protection must be instituted in all decisions to target cultural sites. Permitting the unregulated targeting of historic sites in Iraq will only cause further harm to the culture of the people being subdued by ISIS. In order to win this fight against an enemy bent on cultural domination, the very essence of what is being fought over must not be a casualty of the war.<sup>127</sup> The current gap in protection created by this waiver leaves too many sites as potential targets as ISIS occupies more territory in Iraq.

To develop guidance for commanders to determine the best method of forcing rebels out of cultural sites, it is helpful to consider past circumstances in which commanders opted to err on the side of preservation over destruction. During World War II, Nazi officers established headquarters in Rome near the city center. When Allied forces began bombing runs in Rome, they predominantly chose

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126. John Kerry, Sec'y of State, Statement as Chair of Ministerial Debate of the U.N. Security Council on Iraq, (Sept. 19, 2014), in *Statement as Chair of Ministerial Debate of the UN Security Council on Iraq*, U.S. DEP'T OF STATE, <http://www.state.gov/secretary/remarks/2014/09/231882.htm> (last visited Mar. 20, 2015).

127 Cf. Memorandum from Dwight D. Eisenhower, *supra* note 32.

targets on the outskirts of the ancient city, to avoid damaging buildings near the center.<sup>128</sup> They also used their most precise aircraft and most experienced pilots to cause the least amount of damage to the identified targets.<sup>129</sup> Using these techniques, the Nazis were effectively crushed and forced to withdraw from Rome, leaving the historic headquarters building intact and nearby residents relieved that they had been spared.

In the First Gulf War, military commanders refrained from attacking two MiG fighter planes because they were landed near a temple at Ur.<sup>130</sup> In this situation, the site was a legal target because the area was being used for military purposes.<sup>131</sup> Military necessity could have also been satisfied by arguing that destroying the planes achieved a military goal. However, the DoD report to Congress following the conflict claimed that the decision to not bomb the site was made to protect the archaeological site, and the military gains that could have been achieved were outweighed by the importance of preserving the temple.<sup>132</sup>

In these two situations, commanders balanced the importance of protecting a site and the military benefit gained from an attack. This is an appropriate reaction to a protected site, and begins with an assumption that the site should be preserved, not an assumption that it is a viable target because it is being used for military purposes.

This training to evaluate potential targets must be integrated into all levels and stages of military planning. The Reserve Officer Training Corps (ROTC) and the service academies have begun to develop training plans for cadets preparing to take leadership of platoon-sized elements.<sup>133</sup> This training helps to instill in future generals the importance of protecting cultural sites. In addition, region-specific cultural heritage training is provided to troops as they prepare to deploy, helping soldiers identify local areas that should be respected.<sup>134</sup> The COCOM Cultural Heritage Action Group, which

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128. O'KEEFE, *supra* note 15, at 72.

129. *Id.*

130. Forsyth, *supra* note 100, at 91.

131. *Id.*

132. *Id.*

133. John A. Valainis, *Developing a Cultural Property Protection Training Program for ROTC: Methodology, Content, and Structure*, in *CULTURAL HERITAGE IN THE CROSSHAIRS: PROTECTING CULTURAL PROPERTY DURING CONFLICT* 93, 93 (Joris D. Kila & James A. Zeidler eds., 2013).

134. WILLIAM D. WUNDERLE, *THROUGH THE LENS OF CULTURAL AWARENESS: A PRIMER FOR US ARMED FORCES DEPLOYING TO ARAB AND MIDDLE EASTERN*

advises military commanders on cultural resource issues, regularly updates regional guides and training products to help commanders better prepare for forward deployments.<sup>135</sup> This training should be required in non-deployment cycles as well, to ensure that troops have a more complete understanding of why cultural sites should be respected during conflicts. Officers in the Judge Advocate General Corps (JAG), already trained in operational law and the law of war, should also be provided with theater-specific issues before advising a commander on no-strike lists and possible cultural sites during deployment.

The question of what sites should be protected and if there are different levels of protection for different kinds of sites, still cannot be easily answered. The Second Protocol proposed a list of sites that would receive “special protection” in the case of conflict.<sup>136</sup> Countries created these lists and were also responsible for properly identifying these sites to combatants during conflict.<sup>137</sup> Today, however, an independent organization such as UNESCO should be responsible for developing such lists. In particular UNESCO already has an established method of evaluating cultural sites and providing support for labeling them, as a result of its programs to designate World Heritage Sites, and its maintenance of an objective monitoring program to track damage to areas in conflict.<sup>138</sup>

More practically, though, no-strike lists continue to be a crucial element in planning. In Iraq and Syria, UNESCO has already provided the U.S. and other supporting nations with lists of cultural sites in the areas of operations.<sup>139</sup> These lists should be utilized in planning future targets, to prevent damage to sites and surrounding areas. The presence of ISIS forces at one of these sites should not present a waiver of protection, as it has in the past. Rather, when a site is being used for a military purpose, the analysis should balance possible courses of actions and their outcomes with the potential damage to the site. If the site must be targeted, perhaps because of the presence of a high value target or a large number of rebel combatants,

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COUNTRIES 76–77 (2006).

135. See generally *Commander's Guide*, COCOM CULTURAL HERITAGE ACTION GROUP, <http://cchag.org/index.php/what-we-do/commanders-guides/> (last visited Apr. 12, 2015).

136. Second Protocol, *supra* note 54, arts. 10, 11, 27.

137. *Id.* art. 11.

138. *About World Heritage*, UNESCO WORLD HERITAGE CONVENTION, <http://whc.unesco.org/en/about/> (last visited Mar. 20, 2015).

139. Kerry, *supra* note 130.

the least-damaging option should be utilized, and the resulting damage to the site must be proportional to the advantage gained.

As the front lines of battle shift, an offensive move against ISIS forces should include a strong defense of sites that ISIS will likely target, such as the mosques and museums in areas ISIS approaches. Since ISIS has shown it they plans on targeting such sites, preventing ISIS from gaining ground and occupying these sites will frustrate their plans to use these sites for propaganda. Proactively positioning ground troops around a site in this way complies with international law because the soldiers will be defending the site, not using it for a military purpose. In some regions, such as in Northern Iraq, local fighters banded together to protect their sacred sites.<sup>140</sup> The Sharfadin temple, considered sacred to the Yazidi minority group, has been surrounded by fighters since ISIS first swept through the region, and still stands, despite shelling.<sup>141</sup>

In addition to actions that can be taken immediately, the national courts of Iraq and Syria, along with the ICC, must be prepared to prosecute the destruction of cultural sites both as a crime against humanity and, more conventionally, as illegal property damage. As the ICC investigates charges in Mali, the individuals responsible for ordering attacks on cultural property must be held accountable. Major Kornegay has recommended a “crimes against humanity” approach to prosecuting the leaders and individuals responsible for destroying cultural sites in the Middle East, as this ancient heritage rightfully belongs to all people.<sup>142</sup> While a gap may remain in international law for criminalizing internal conflicts, the ICC must be prepared to take the initiative and begin working with nations to prosecute radical groups like ISIS.

## CONCLUSION

International customary law has developed to protect cultural property sites from state action in armed conflict, but does not provide any protection from radical religious militants who target such sites. In order to preserve the mosques, libraries, and other cultural sites of Iraq and Syria from destruction, intervening nations

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140. Ari Shapiro, *Outmanned and Outgunned, Fighters Defend Yazidi Shrine Against ISIS*, NPR PARALLELS BLOG (Feb. 13, 2015, 3:43 AM), <http://www.npr.org/blogs/parallels/2015/02/13/385802886/outmanned-and-outgunned-fighters-defend-yazidi-shrine-against-isis>.

141. *Id.*

142. Kornegay, *supra* note 85, at 175.

must consider these sites to be protected from military action, except when a careful balancing of military necessity and proportionality deems action to be truly necessary. As local citizens have shown, a strong defense of these sites can sometimes be the best option. While destruction of cultural property should be the principal concern, prohibiting the worldwide sale of stolen movable artifacts will decrease the attractiveness of looting and pillaging of such property. Throughout any conflict, all involved nations must be committed to stopping war crimes against human cultural history and must be prepared to prosecute combatants for their crimes. If these principles can be followed, the heritage of the Middle East can be protected for future generations.